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ANTITRUST LAW

E.U. Private Actions

here has been considerable progress in recent years toward antitrust law convergence between the United States and the European Union. However, one area where the gulf between the two regimes remains wide is private antitrust enforcement. While U.S. antitrust cases make up a significant portion of the nation's court dockets, the number of recent successful E.U. private competition lawsuits can almost be counted on one hand. But that may be about to change.

Efforts now under way to modernize competition law in the European Union may bring meaningful private enforcement. In September 2004, the European Commission (E.C.) published a report on the state of E.U. private enforcement that found "total underdevelopment." See http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/index en.html. Europe's competition law leaders have indicated that enhancing private enforcement is one of their top priorities. Competition Commissioner Neelie Kroes stated in March that the absence of E.U. private enforcement "means that the comprehensive enforcement of the competition rules is not yet complete." Kroes cautioned that this leads to underdeterrence and means that "the victims of anticompetitive activity are not being compensated for their losses." The E.C. plans to issue a "green paper" on steps that could improve E.U. private enforcement.

An obvious model that the E.C. will consider in updating its private enforcement regime is the highly developed U.S. By Janet L. McDavid and Howard Weber





system. The E.C. clearly will not endorse the wholesale adoption of the U.S. system. At the very least, cultural differences—and the European perception that there are too many lawsuits in the United States—will ensure that significant differences between the two regimes remain. However, the E.C. will have to assess carefully features of the U.S system as it considers how to improve private enforcement in the European Union.

Key features of the U.S. private enforcement regime

In the United States, the antitrust laws are well entrenched in the nation's business culture. The U.S. antitrust laws explicitly provide for a number of incentives to encourage "private attorneys general," including permitting a successful antitrust plaintiff to recover treble damages, its attorney fees and costs, and injunctive relief (which can include behavioral and structural remedies). Plaintiffs in the United States can sue for violations of any one of the antitrust laws, not only "hardcore" offenses such as

price fixing. Additionally, federal law provides that a judgment obtained by the U.S. Department of Justice has prima facie preclusive effect in subsequent private litigation.

The U.S. courts also open their doors to all types of plaintiffs. Consumers and customers can recover unlawful over- charges or other damages, while competitors may recover lost profits, and government entities, including federal, state and municipal entities, may also bring actions, either as market participants or, at times, on behalf of their citizens.

U.S. law does limit the individuals entitled to sue under the doctrine of standing. For example, only "direct purchasers"—those that purchased the good subject to the unlawful overcharge directly from the defendant—are entitled to sue. This rule ensures that direct customers can bring suit while avoiding the complications that would accompany attempts to calculate the precise overcharge the customer passed on to each entity in the chain of distribution. But several U.S. states allow indirect (which often include purchasers consumers) to sue under state law.

The U.S. courts are hospitable to private antitrust plaintiffs. Plaintiffs generally can bring a case in the United States without having to allege the offense with great particularity. Further, once they reach the discovery phase, antitrust plaintiffs are afforded very broad discovery that makes it possible for them to obtain access to a significant number of the defendants' documents and witnesses. The courts also have reduced standards of proof concerning damages;

so long as the plaintiff proves with a reasonable degree of certainty that it was damaged, its proof can be a "just and reasonable" estimate of damages (but the estimate cannot simply be speculation or guesswork).

The availability of class actions also makes it possible for plaintiffs with small claims (or, at least, class action lawyers) to file antitrust cases. Antitrust class actions, as well as the uncertainty inherent in the U.S. jury system, can create very significant pressure on defendants to settle, which has been one of the criticisms by the business community.

The study on E.U. private enforcement reveals important factors that likely contribute to its "underdeveloped" nature. While articles 81 and 82 of the E.C. Treaty provide the standards that govern E.U. competition law, they do not provide for a private right of action. Instead, those questions are left to national law, which means that potential plaintiffs are left with little or no legal guidance in many jurisdictions. Only 12 member states (out of 25) appear to expressly permit private damages actions based on competition law, and only three expressly permit the enforcement of articles 81 and 82.

This situation was addressed in 1999 by the European Court of Justice in Courage v. Crehan, Case C-453/99, 2001 E.C.R. I-6297, where the ECJ held that the national courts must provide a private remedy for violations of Article 81 (the analog of § 1 of the Sherman Act). However, the specific remedies and procedures will vary depending on the jurisdiction, and the availability of private rights of action for Article 82 (i.e., monopolization) remains less established. Further, the persistent variation in local competition and procedural law among E.U. member states raises the possibility of inconsistent verdicts and forum shopping. These issues will need to be addressed if the E.C. hopes to create a rational, efficient and effective private enforcement system.

The incentives for private enforcement in the European Union are significantly weaker than here. Perhaps most importantly, damages are limited to restitution; treble, exemplary or punitive damages are generally not available.

Questions over whether E.U. courts will be open to injunctive and behavioral remedies also likely weaken the incentives of private parties to bring suit. Moreover, the E.U. system of "loser pays" likely deters some plaintiffs because, while a successful plaintiff will recover attorney fees in addition to the restitutionary damages, an unsuccessful plaintiff will pay the defendants' fees (which means that plaintiffs must be prepared to accept a significant financial risk). Additionally, E.U. government judgments

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are not generally provided with preclusive effect, although they are generally admissible in private actions and often viewed as having high evidentiary value.

A private plaintiff generally must have an interest to have standing to sue in the European Union, but this issue has not been as thoroughly litigated as in the United States. Also, it is likely that a "pass-on defense" could be used in most E.U. jurisdictions, which could present a further barrier to the direct purchaser cases. Since it is an open question whether indirect purchasers would be entitled to recover for the passed-on portion of the overcharge (no such cases have been reported), the lack of clarity in this area likely poses a significant obstacle to private lawsuits by customers.

Discovery in E.U. courts is much narrower: In general, parties must specifically identify the documents they seek. Some private plaintiffs have attempted to overcome this limitation by seeking to obtain evidence from the investigatory files of the E.C. Although the E.C. has generally resisted such requests, a recent

decision by the European Court of First Instance suggests that the E.C. may have to reconsider its position on this issue. If the evidence collected by the E.C. becomes accessible to private plaintiffs, this could have a major impact on private actions.

E.U. courts, like U.S. courts, place the burden of proof on plaintiffs to prove causation and damages. Further, although some member states' courts permit a lower standard of proof on the extent of damages once the "fact of damage" has been shown, this practice is subject to some uncertainty depending on the jurisdiction. Moreover, there is generally no E.U. equivalent to the U.S. class action, although some member states allow collective actions.

Encouraging private litigation in the E.U.

More than 800 federal antitrust cases were filed in 2004 in the United States, in addition to the numerous "indirect purchaser" cases filed in state courts. In contrast, in the European Union, there appears to have been only about 12 successful damages awards for violations of E.U. competition law since 1962.

There appears to be widespread support for a move toward a more effective private enforcement regime in the European Union for competition law violations. To the extent that the Crehan decision, competition law modernization and greater enforcement attention contribute legal clarity concerning the availability of private actions, they are sure to pave the way for more such actions. However, the European Union will probably have to reconsider a number of the issues noted above if it intends to increase private enforcement meaningfully. It seems likely that the European Union will take steps to encourage private enforcement, but it is hoped it will manage to avoid the excesses in the U.S. system. NU

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